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Paradoxes of Canadian Legal Education

Harry W. Arthurs

Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca

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Articles

H. W. Arthurs*

Paradoxes of
Canadian Legal
Education

I. Introduction

If the history of Canadian legal education should ever be written, these years of the mid-1970s will surely be viewed as a period of critical significance.

For at least a quarter-century, growth has been the predominant theme: growth in student numbers and faculty complements; growth in democratic decision-making by both faculty and students, but also — inevitably — in the bureaucratic structures of faculties; growth of physical facilities and indeed, of whole new faculties; growth of libraries and of the pace and variety of research; growth of curricula and of teaching methods; growth in professional esteem and in public contribution; and — I believe — growth in quality throughout the entire system of legal education.

But now, suddenly, ominously, growth ceases. There is no need, says the bar, for more lawyers in a profession already overcrowded and confronting legal aid cutbacks, no-fault insurance and no-fault divorce — all of which will generate more competition for less work. There is no money, say the governments, for more books, for better student: faculty ratios, for more research or expensive clinical programmes or increased scholarships and bursaries. “The economy has become the secret police of our desires”. (Graffito seen in London, England, July, 1976)

And these nay-saying voices find echoes within the law schools. Students are anxious to maximize their job prospects and are focussing their academic efforts — often quite mistakenly — on courses which they believe will attract potential employers. Faculty members are perhaps less willing to dream of greatness for their institution and themselves, more willing to redefine their roles as potential participants in, not to say servants of, the *status quo*.

*H. W. Arthurs, Dean and Professor of Law, Osgoode Hall Law School, York University

This article is the text of the second Horace E. Read Memorial Lecture delivered at the Dalhousie Law School, October 27, 1976.

Let me not overstate my case: I am speaking only of changes at the margins. Even in the "golden age" of the 'sixties and early 'seventies not every teacher was a visionary, not every student a servant of justice, not every school a pedagogic paradise. Nor are our present law faculties peopled entirely by drones and self-seekers. I am speaking rather of subtle changes in the archetypal figures, and above all, in the mood of Canadian legal education. I am speaking of a situation which is sufficiently fluid, sufficiently amorphous, that its ultimate shape is as yet unclear.

Indeed, the premise of these remarks is a simple one: if we know where we have been and where we are, we will be better able to decide where we wish to go and how to get there. I believe that the validity of this premise can best be tested by applying it to a series of specific, but ultimately interconnected, paradoxes which seem to require resolution if we are to move Canadian legal education ahead. Let me set out some of these paradoxes, and then try to resolve them.

First, who attends law school? Although we have tried to assure that students enter law school on the basis of merit alone, it is probably much harder than it used to be for members of disadvantaged groups to gain admission. Although we have become increasingly sensitive to the need to democratize the profession by changing its recruitment patterns, we may well be about to witness even greater social stratification within its ranks.

Second, what do people learn in law school? Although we have introduced an almost infinite variety of courses and seminars, with great diversity of teaching methods, we have somehow failed to alter fundamentally the intellectual and social perceptions of most students, to stimulate them to take the chances offered them, to accept the risks of the unfamiliar in exchange for the possibility of both personal development and a different sort of professional future.

Third, how well do people perform? In the past fifteen years, admission standards have risen beyond any reasonable expectation. No one enters law school today who cannot cope with the work, and many present most impressive prelaw credentials upon admission. Yet we cannot honestly claim that the law school is the home of excellence, or that the reach of every student exceeds his or her grasp.

Fourth, what is the quantity, quality and direction of legal scholarship today? There are ten or twenty times as many law

teachers now as there were in 1950. But is there ten or twenty times as much scholarly writing? Is it appreciably better? We accept that the social sciences can do much to inform and invigorate our analysis of the legal system — a commonplace today, but a heresy in 1950. But is this perception widely translated into practice by legal scholars?

Finally, what is the role of the law school within the Canadian legal system? There can be few countries in which professional law teachers have contemporaneously occupied the positions of Prime Minister, Minister of Justice and Chief Justice, to say nothing of the other judicial posts, chairmen and members of law reform commissions, labour relations boards, securities commissions, professional governing bodies, legal aid commissions, royal commissions, and deputy ministerial posts. But has there been a contribution, a distinctive intellectual contribution, commensurate with the great recognition for legal education implicit in these appointments? And how is it that law teaching nonetheless remains a precarious and transitory profession which must still struggle to attract the best prospects and to persuade them to make scholarship their life's work?

II. Two General Observations

Having posed some difficult problems, and promised solutions, let me digress only to make two general observations.

So far as the problems are concerned, I freely concede that I have identified those which seem most pressing from my own particular perspective. We have little, if any, objective information about Canadian legal education — or the legal profession itself — beyond some basic numbers: how many students, faculty members, books or lawyers in a given province. And even these basic numbers are of questionable accuracy and of very recent vintage, so that it is difficult to make comparisons across time or space, with our own recent past or amongst law schools. Thus, my whole thesis lacks the factual foundation which it ought to have.

So far as the solutions are concerned, it will be even more obvious that I am speculating and advocating, rather than reporting certainties. To a large extent, what can be accomplished depends on the resources available: how many dollars, which men and women, in what kind of environment? These resources are largely determined by forces over which we have no control. Thus we shall have to work pretty much with what we are given, and my

“solutions” really amount to no more than an attitude, and approach, to the use of available resources.

Now to specifics.

III. *Access to Legal Education*

I have suggested that who attends law school is a question of great importance. Entry into the legal profession *via* law school is now, and for the foreseeable future, a considerable privilege. Equal access to that privilege for everyone of equivalent ability, regardless of sex, race, or economic status, must be a democratic objective of importance to both the legal profession and the general community. However, it is an objective of special importance to groups which have been badly underrepresented in the past — women, native persons, recently-arrived ethnic groups, and the working class generally. So long as these groups are absent from the profession, qualified individuals will be denied the privilege I have mentioned. But, as well, the groups themselves will not have equal access to the legal services they require. They may have difficulty in relating to the lawyers who serve them because of linguistic and cultural barriers, and they may not be able to muster legal resources in aid of matters of special concern to them. There has been, at least until recently, a singular lack of attention paid by lawyers to the legal problems of women, to native land claims, to immigration law and to social legislation.

This situation has recently begun to change. Women, not yet equally represented in the law schools, have increased by a factor of five or ten in the last five or ten years. Native persons, assisted by initiatives of the federal Department of Justice, the Native Law “headstart” programme of the University of Saskatchewan, and by efforts of other governments and universities, are now entering law school in perceptible, if not acceptable, numbers.

It is the other two groups which present the greatest difficulties. Those who come from homes where English (or French) is not a first language, where reading and articulate speech are not family habits, or where finances are not available to permit children to study rather than work — such individuals are effectively excluded from law school. Few of them get to university, few of them do well there, and few of them perform well on law school admissions tests which evaluate literacy and writing ability. And of those very few who do all these things, only a minor fraction can afford the lengthy and costly process of legal education.

The law schools are generally well aware of the problem and have struggled to meet it. Many law schools now accept mature students on the basis of ability demonstrated at work or in community service, rather than in university studies; some law schools have been able to provide modest — though seldom adequate — bursaries and loans; a few even offer special tutorial assistance to help these individuals adjust to legal studies.

But I am afraid the mountain has laboured to bring forth a mouse. I do not detect any fundamental change in the recruitment patterns of Canadian law schools. On the contrary, I have the impression that even the modest gains of the past few years are in danger. On the one hand, as admission standards continue to rise across the country, access for those who are at a competitive disadvantage becomes more difficult. On the other hand, as studies show, graduates whose socio-economic status is not high, especially if their academic record is not superior, are consigned to less prestigious and less rewarding work within the profession. If, as we predict, competition within the profession will increase with increasing numbers, this process of professional stratification will be enhanced. Thus, over the next few years, attempts to persuade members of disadvantaged groups to take a chance on legal education may be undermined by bleak prospects for ultimate success in practice.

What is to be done?

Obviously, to the extent that the fate of law students from disadvantaged groups is a function of general social and economic conditions, there is little the law schools can do. If there is no money for grants or loans, if there are too few jobs in a crowded profession, the law schools cannot ease the financial burdens to any great extent.

But at least one practical measure may be within our grasp. Should we not reconsider the possibility of permitting some individuals to work their way through law school, and to attend classes on a part-time basis? I do not advocate, let me stress, a general return to the system which prevailed historically in Canada, whereby legal education was essentially that of apprenticeship, with a small, barely-tolerated academic component. Nor do I advocate that we imitate the high-enrolment, low-quality urban night schools once popular in the United States. I do suggest, however, that it ought to be possible to obtain in some place in most regions of this country a legal education comparable in quality to that presently

offered, but an education which does not require full-time attendance and hence abandonment by the student of all other responsibilities.

Working people, women with child care obligations, perhaps individuals in public life, could be carefully selected for such a programme. They obviously would require the intellectual ability expected of students generally, but would also be selected on the basis that they could survive this rigorous programme, and ultimately would make some contribution to the community.

On the part of the law school, what would be required would be a redeployment of faculty and modest amounts of ingenuity. Would it not be possible, for example, to run one section of first year in the evenings? If there are too few part-time students to make this worthwhile, perhaps some full-time students would prefer to attend evening classes? Would it not be possible similarly to schedule some reasonably esoteric courses and seminars for similar mixed participation, or even to develop a specialized curriculum which would be of interest to this special student constituency? I have in mind, for example, courses in such subjects as Company Law and Taxation which focus on the problems of individuals and small businesses, rather than the more usual preoccupation with the affairs of large public companies.

Nor is this the only conceivable model of part-time legal education. It is possible, for example, that a law school located in a large government centre might develop a programme of part-time study specifically directed in both form and content to members of the public service. Or a law school in a large metropolis might be able to develop a work-study scheme in which periods of formal full-time education are interspersed with relevant work experience.

The point is, surely, that our present single model for obtaining a legal education excludes many who are well-qualified and deserving. If we put our minds directly to this problem, we should be able to devise a system of part-time education which meets the needs of these individuals, without compromising our professional standards.

IV. What Do People Learn at Law School?

In assessing what people learn at law school, it is important to distinguish this from what they study. In this distinction, perhaps, lies a partial explanation of the apparent survival of the traditional orientation of law students in the face of a changing curriculum.

To begin with the issue of the curriculum, the first year courses in Canadian law schools, with but a few exceptions, have remained largely unchanged since the dawn of time. And despite the virtually total optionalization of second and third years, most students study most courses which used to be compulsory. Except for the addition of some specialized and advanced seminars, the transcript of the average student graduating in 1976 would not look radically different from that of 1956 or even 1926.

But even for the average student, course titles do not tell the whole story. To say that a student “learns” Contracts or Company Law, Torts or Taxation is to conceal rather than to reveal. In 1956, for example — I speak with some authority on this point — a student of Torts, learned about negligence and little else. Negligence, to be sure, was not only an end in itself, but as well a vehicle for developing analytical skills through case briefing and classroom discussion. And, in the best Torts classes of 1956, one even acquired the impression that individual judgments, and perhaps the whole tort system, were not beyond criticism. I doubt that my description of Torts in 1956 would entirely misdescribe Torts in 1976 — but I know that in some classes, at least, the emphasis has shifted. I suspect that the rules of negligence law continue to dominate as a topic of discussion, but that now they much more clearly serve other purposes. Much greater attention is likely paid to case analysis as a skill; much greater stress is laid on the limits of common law litigation as a system of loss distribution, on the intellectual viability of concepts such as “fault” and “deterrence”, on insurance, legislation, and state compensation schemes.

The emphasis in learning in first year has thus shifted somewhat from rules to skills, from the case to the system, from litigation to legal process. Thus, without any change in the outward appearance of the curriculum — “Torts” remains “Torts” — the student’s learning experience is substantially altered.

But in fairness, I must also confess that the converse of this phenomenon may also be true. The apparent proliferation of courses and seminars does not necessarily signal a new range of learning experiences. In some cases, these courses or seminars are decorated with attractive titles — at a minimum they bear the prefix “Advanced” or the Roman numerals II or III — but they are merely a more intensive or extensive exploration of themes which could have been covered in the basic course if it had not been shortened to

make use of the hours in order to create time for new options. Nor is this necessarily a bad thing; these themes may not be of general interest, and it ought to be possible to acquire a basic knowledge of a subject without becoming immersed in them. However, that a student will learn more than mere rules is not inevitable. His intellectual horizons are not necessarily broadened because his choice of options is doubled or trebled.

If we can concede, then, that the curriculum will not tell us what students learn in law school, where else can we look?

Here we encounter some problems of evidence. It ought to be possible to examine syllabi rather closely to determine what is being taught and to assume that this is also what is being learned. Sometimes this will undoubtedly be true. New teaching approaches designed specifically to transmit skills, attitudes or knowledge often deliver what they have promised. Clinical training programmes are a good example of this: students develop skills of interviewing, counselling, negotiating and advocacy, attitudes of professional responsibility, and substantive knowledge in areas such as landlord and tenant, immigration, and welfare law — all of which were denied to their predecessors ten or twenty years ago. And new approaches to conventional courses may likewise offer new learning experiences, as I have tried to demonstrate in relation to Torts.

On the other hand, what is promised is not always delivered, what is delivered is not always accepted, and what is accepted is not always retained as part of a student's professional, intellectual equipment.

As to the gap between promise and delivery, it must be frankly stated that the difference between course descriptions and classroom performance amounts occasionally to "more than a mere puff". There are particular risks in relation to interdisciplinary materials in this regard, albeit for reasons which are easily understandable. A course which promises (as most do) the understanding of an area of law from a socio-economic perspective has set its sights high, and properly so. The role of the family, the labour union, the business corporation must be understood in social or political or economic terms if the relevant legal rules are to be understood and evaluated critically. But consider the obstacles to understanding at that level. The instructor must educate himself, often in an area where he lacks either a background or the assurance of continued involvement in the future. He must then locate materials suitable for inclusion in his course and edit them for use by students whose knowledge of the

particular subject may range from graduate-level sophistication to total ignorance. And finally, he must persuade students that these materials are not only intellectually stimulating, but within their grasp, and ultimately worthy of their attention. Small wonder, then, that so much of what is promised as an interdisciplinary perspective actually is delivered in hurried, embarrassed or defiant *ex cathedra* pronouncements about “social policy”, vague allusions to the infinite complexity and mystery of the subject matter, or humorous anecdotes and insider information about recent cases or legislative developments.

But despite these difficulties of delivery, and they are serious, real problems with the educational equation exist on the “demand” side as well as the “supply” side. Students always could learn what they wished to learn, and now may study what they wish to study. If the curriculum they define for themselves excludes the unconventional, if they edit out themes of intellectual significance and cling to those which are perceived to be negotiable professionally, no mere faculty manifesto, not even the deep and passionate conviction of professors or deans, will alter substantially the intellectual environment.

One cannot escape the conclusion that students are a significant conservative force in legal education. For many years, this fact was obscured by the convenient presence of restrictive regulations imposed by the legal profession itself. So long as the profession defined or dictated the structure of curricula and courses, no issue arose between faculty and students. But when those external constraints were removed, a new underlying reality began to emerge. At first blush, it seemed, during the 1960s and early 'seventies, that, in debates between faculty and students over the future of legal education, the students' position was the more liberal one. But hindsight shows us that the students were concerned about process and not about substance. They were preoccupied with who would make the decisions and how and within what range of possibilities, rather than with the actual content of what would be learned in law school.

Personally, I have always believed — and continue to believe — that students should have a significant role in the governance of the law school, that they should have a range of learning possibilities open to them, and that as consumers their judgment ought to be accorded substantial deference. But I cannot say honestly that I think that this judgment has always been exercised wisely.

For many students, the most significant single factor in the selection of a programme of study is whether or not the courses chosen will advance their professional careers.

Even if one were to concede that man does live by bread alone, it seems to me that this basis of choice is often counter-productive. And so it is bound to be: no one, least of all law students, knows very much about what is actually done in the practice of law. How many lawyers, for example, spend how much time in drafting wills and administering estates? How central is litigation to the practice of most lawyers, and precisely what skills and substantive knowledge does it require? How often does a lawyer become involved in the administrative process, what is his role, and what relationship does it bear to courses on Administrative Law? In the absence of any reliable information, a considerable presumption is made in favour of what has always been done. If senior members of the profession studied Wills, Real Estate and Administrative Law, then their aspiring successors will do likewise. Never mind that their education may have been entirely irrelevant to their practice, never mind that the frontiers of lawyering remain to be discovered, never mind that the greatest competition will exist amongst the mass of graduates conventionally equipped for conventional career options — never mind all that; stick to the straight and narrow. In terms of simple self-interest, it strikes me that many law students select precisely the wrong kind of programmes.

But I have defined self-interest narrowly, equating it with professional advancement. There are other kinds of self-interest which are no less important. I refer specifically to personal growth and development which builds upon a foundation laid in the years before law school, and which infuses a life lived beyond the boundaries of the law, in the family, the community, and the house of intellect. So many law students seem singularly indifferent to the fact that at the end of their education they will be human beings still. Why, therefore, they should abandon earlier interests in history or philosophy, sociology or economics, it is difficult to understand. Why they should retreat from speculation and experimentation is puzzling. And I do not even stoop to the assertion that these apparently “non-professional” interests may in fact contribute greatly to professional possibilities and satisfactions.

However, while my comments (I believe) accurately describe the majority of law students, there has at least emerged a vital minority whose perceptions and values are quite different. These

students do take pleasure in learning the law for its own sake, do want to repeal the traditional limits of study and research, do dare to define themselves as a new, more humanistic breed of lawyer. Even if only a few such law students emerge each year in each school, or even some years in some schools, we will have made considerable progress.

And they are emerging: the problem is how to protect such individuals from peer pressures and professional pressures to conform to traditional learning patterns.

A minimum feasible answer, lying within the grasp of every law school, is to encourage these students from the beginning of their legal studies. At present, we select entering students on the basis of success they may have achieved in pre-law work as philosophers or economists or sociologists. But once they enter law school, we force them to abandon their expertise; we immerse them totally in caselaw so that they will learn to "think like lawyers". Is it any wonder that they surface, born again as it were, to repudiate their former intellectual identities? And is it any wonder that they are reluctant, in second and third years, to stray from what they now perceive, what we have defined implicitly, as the straight and narrow path of professionalism?

We must give these students something more in first year. Perhaps we should offer them an opportunity to enrol in courses outside the law school, or interdisciplinary law school options, or expose them egregiously to broad social and intellectual questions rather than a steady diet of caselaw; perhaps we should do all of these things. For if we do not do something, they will never be given the chance to survive as intellectuals.

However, the law schools cannot afford to mount endless, exotic upper-year courses in which no one enrolls, or to create an artificial demand for them by restricting enrolment in the more conventional courses most students prefer to take. Neither tactic represents a legitimate use of scarce resources.

A more reasonable tactic is for at least a few law schools to offer programmes which will appeal to special contingencies. One school might stress its law and economics programme, another its concern with the environment, a third its links with public administration. Students attracted to such programmes could apply for admission either initially or after completing part of their education elsewhere. Conceding that all law schools must commit themselves primarily to

preparation for traditional practice roles, it does not follow that none of them can do anything else in addition.

Nor should students who cannot attend such special programmes simply be written off. With the investment of only a little extra faculty time, and the introduction of only a little flexibility in the administration of academic regulations, many well-motivated students can be accommodated in individually-designed programmes of reading and research.

V. The Problem of Quality — Students

I come now to a very sensitive topic: quality. Let me say, immediately, that I have no complaint about quality overall. I believe that most of our students perform reasonably well, and that the overall average is considerably better than it has ever been. But this is precisely what one would expect given the fact that it is probably easier for a camel to pass through the eye of the needle than for an applicant to enter a Canadian law school. What I want to confront, however, is the paradox that so much talent produces so little first class work.

The paradox is, of course, easily resolved by redefining what we mean by first class work. Perhaps we see so little of it because we set unrealistic standards which are unlikely ever to be attained, and award ordinary grades to work which actually is first class. Or perhaps law students are not really very able after all. The apparent excellence of our entering students may be an illusion created by the inflation of grades in the undergraduate faculties. Or, to borrow a metaphor from Canadian literature, perhaps our students are merely “survivors” whose struggles with an essentially inhospitable environment leave little time for polishing a thin and pretentious veneer of academic achievement. Any of these explanations would help to resolve the paradox.

But I believe there is a more fundamental issue. The greatest enemy of excellence in Canadian legal education is the lack of a Canadian tradition of excellence. We have had, it is true, some very fine law teachers and judges and practitioners. But their accomplishments were individual, not collective. We cannot speak accurately of a “Canadian school” of jurisprudence, of a “Canadian tradition” of scholarship in particular areas, of a “Canadian contribution” to the development of legal education.

Of course, there are exceptions. The Supreme Court of Canada in

the 1950s was — as our courts go — a liberal institution. But the “Rand Court” of the 1950s was not really the equivalent of the American “Warren Court” of the 1960s. Its performance, remarkable in a Canadian context, was much more evident after the fact than it was at the time; it attracted little public interest, and rather modest scholarly support. Its writ expired with the tenure of its members. A change in its personnel was marked not by a struggle between old and new philosophies but by the disappearance of one and the emergence of another. The picture is very different from that of the post-Warren era in the United States.

Nor have very many of our law teachers or lawyers — again with a few honourable exceptions — left more than memories behind them. The Dalhousie Law School in the Weldon era, Toronto in the 1950s and Osgoode in the late 1960s each stood for something; each had an ethos, a character, which was greater than the sum of the individual contributions of its faculty and students. But we have experienced nothing like a Harvard or Yale or Columbia or Chicago whose law schools have for decades symbolized a distinctive approach to law and to law teaching, and a standard of faculty and student performance which excited rivalry and imitation as well as frequent self-criticism and occasional smugness.

Few treatises were ever written by Canadians, and fewer yet of these can be said to have been influential in the development of Canadian law. Indeed, even the business of collecting basic legal documents — cases and statutes — has been conducted in such a fitful, derivative and desultory fashion that access to them is virtually unattainable.

All this is meant not so much as an indictment as a plea in mitigation of sentence. We are not excellent because we are not building upon solid foundations. Every time we address a problem, we must do so as if for the first time. No matter that a brilliant professor or advocate may have rationalized a line of cases in class or in court; his theory served the purposes of the moment but was not preserved for posterity. No matter that a brilliant judge devised a new approach to the reading of our constitution or a modern application of an ancient property doctrine; his judgment probably passed without academic comment or controversy, was mis-catalogued crudely in some digest, and is now conveniently ignored by his successors who would prefer to respond to the same question in a different fashion without the awkward necessity of making fine distinctions.

In sum, because we have not built upon our past, we cannot hone our skills on the controversies of the present, and will not properly define the path of the future. Little wonder, then that even many leading judges and practitioners and good students are often content to answer questions in modest and expedient terms rather than setting them in the context of a theory, that their "research" encompasses the obvious, but seldom reaches beyond, that compilation and amicable reconciliation of every case, rather than critical juxtaposition, is the order of the day.

If there is any merit in my analysis, it will be clear that there is no easy road to excellence. We cannot rewrite the past, recapture lost opportunities, invent a tradition. But neither can we accept the permanent tyranny of "good enough".

What is needed in Canada is the development of structures which legitimate and encourage excellence. In the United States, the great national law schools perform this role by recruiting students of astonishing talents from across the country, and by exposing them to elite faculties. Graduates of these schools are accepted almost automatically into leading law firms, coveted judicial clerkships and key government positions. The very fact that an individual was admitted to, and performed successfully at, one of these schools is a sufficient credential.

In this country, we have a much smaller student constituency to draw upon, and constitutional, economic and professional pressures tend to give legal education a provincial focus. We are therefore unlikely to develop national centres of excellence as the Americans have done. The relatively small number of potential legal intellectuals is likely to be dispersed amongst all the law schools.

It is therefore particularly important that each law school should develop a strategy for the encouragement of its best students. In the larger or wealthier law schools, this strategy may include some special courses offering extra challenges and rewards for highly-motivated individuals. In smaller law schools, the best strategy may be to take advantage of the greater personal contact to offer outstanding students individually-designed study projects. In some law schools, serious cultivation of specialized post-graduate studies may be the most effective contribution to the advancement of excellence. But whatever the strategy, its objective is the same: to give the best of our students an opportunity for intellectual growth and self-fulfilment.

So much for the students. What of the professoriate?

VI. *The Problem of Quality — Professors*

On a similar occasion, some years ago, I advanced the proposition that Canadian lawyers and legal educators have passed through several “levels of consciousness” within a remarkably short period of time. The first advance upon the traditional view of law as a series of individual mysteries, rules and procedures was a concern for taxonomy, the organization and rational arrangement of knowledge. This movement had hardly reached adolescence, let alone maturity, before we became preoccupied with questions of ideology and methodology, with the perception that law is shaped by, and helps to shape, social forces, and is not the “brooding omnipresence” which the earlier rule orientation had implied. And, most recently, we have experienced a passionate and outspoken concern for empathy, for the relationship between lawyers and clients at a human level, which in its turn views as arid and oppressive the earlier intellectual movements. These very different views of law, I suggested, have followed so closely upon each other that none of them reached full flower. On the contrary, their virtually simultaneous emergence — over a period of twenty or thirty years — has created tensions and ambiguities within the scholarly community which have proven very difficult to resolve.

Let me illustrate. A considerable debate has been waged in recent years about several aspects of the law of rape. This debate had its origins in the humane concern, properly emphasised, for the impact of existing legal procedures upon rape victims. This concern was translated into ideological terms by the women’s movement which sought to bring about changes in the law in this area. These efforts, however, evoked opposition from the defence bar which was alarmed about the possible unfairness of changes to accused persons.

A serious legal scholar who wished to make a contribution to this debate would find a dearth of either doctrinal writing or empirical investigation on this important subject. He or she would thereupon confront a dilemma. Should research on caselaw and legislation be given first priority? While this seems like a sensible place to begin, if legal rules are to be changed, the exercise smacks of irrelevance: what is analyzed so painstakingly today may all be otherwise tomorrow. Alternately, should empirical research be awarded first priority? Here again there is a dilemma: in the absence of clearly defined objectives, it is difficult to evaluate either current practices

or proposed changes. Thus, there is a great temptation to place small offerings on the altars of both doctrine and experience and to move rapidly towards the task of reform unencumbered by adequate information about either life or law. Nor, I stress, is it really possible to do otherwise. No researcher could perform both of these tasks within a reasonable time. The problem is that there is no well of scholarship into which a researcher can dip, no mentor at whose feet one may learn, no contemporary with whom one can clash or collaborate. In short, in most fields, it is not just the future which begins today, but also the past.

Let me now make explicit what was implicit in this analysis. Canadian legal scholarship, in all of its manifestations, is often inadequate, sometimes acceptable, but seldom — on an objective scale — first class. In other words, if we were to apply the grading profile of student marks to an assessment of faculty members, the results would be pretty much the same.

Nor is this mere coincidence. Each situation helps to perpetuate the other. So long as professors do not demonstrate excellence, they will not evoke imitation amongst their students. So long as students are content with “good” rather than “best”, they will not challenge and inspire their teachers to higher levels of achievement.

I believe that it is possible to devise a realistic strategy for excellence in Canadian legal education. The first component of such a strategy is already in place at virtually every Canadian law school. It involves encouragement and recognition of scholarly achievement. This takes several forms. First of all, it is important that hiring, promotion and tenure decisions give adequate weight to scholarly attainment. Second, there must be a sense of freedom, a sense that no “received truth”, no preeminent authority, has the right to inhibit new lines of argument and inquiry. And third, there must be adequate facilities and resources. All of these conditions exist throughout Canadian legal education.

However, I believe that several important components of a formula for excellence are found seldom, if ever, in our law schools.

Foremost amongst these missing components I would rank a sense of intellectual community. I use this term in several senses. I mean to convey that there must be a “critical mass” of individuals who are committed to high standards in general and to specific areas of intellectual inquiry in particular, so that they can provoke, stimulate and encourage each other, whether through cooperative or

competitive relationships. I do not mean for a moment to suggest that books are to be written by committees or that excellence is to be achieved by conferences. I mean to say, rather, that we should be able to deliver our best to the judgment of our peers, and that intellectual jury duty should be the civic obligation of every law teacher.

A further missing component is a refined sense of time and space. Too much of Canadian legal scholarship is committed to controversies of the moment, to law review articles whose cultivation is geared to the seasons of the academic year, to commissioned studies written against deadlines. Too little of our effort is invested in the exploration of great themes which may consume years of effort rather than months, an entire career rather than a summer vacation period.

Again, I understand the reasons. We want to have an impact on events, we want our work to be useful, and we want to receive from shortrun results the gratification which is largely denied those who submit to the judgment of posterity. Moreover, most legal scholars are too young, too inexperienced, too busy mastering the basics of teaching and research, to attempt anything more substantial. And, after all, why should we? Law and society are changing rapidly. A treatise on the law of taxation or labour relations or environmental law must be published in loose-leaf form or condemned to instant obsolescence. To embark upon the writing of a traditional legal book is a task which is either Sisyphean or just plain silly.

Yet this is precisely what we must do. If we do not, we will be the prisoners of intellectual structures borrowed from the United States or England or France, or cobbled together in Canada in times past. Happily, there is a remarkably encouraging trend towards the publication of major works by a new generation of Canadian legal scholars. Whether these works are of the first quality or not remains to be seen; at least they represent a formidable beginning, and they will stimulate the aspirations of succeeding generations.

Writing books takes time, and time is hard to come by in law schools where teaching loads are reasonably heavy, where accessibility to students is emphasized, where the demands of committee work and administration are never-ending. To be sure, sabbatical leaves often provide time for reflection and research, but even more time is needed. We must arrange to give some relief from other commitments to individuals who embark upon major works of scholarship.

Socio-legal research, as opposed to conventional scholarship, presents special problems. A serious empirical study can seldom be undertaken in a few weeks or months; it is almost bound to stretch over a period of years. But it is preparation for the task which is — or ought to be — most time-consuming. Relatively few law teachers come to empirical research with developed skills. Although committed as a matter of principle to the proposition that the social sciences can tell us much about law, they are faced with a dilemma in attempting to put this principle into practice. If they seek assistance from a social scientist, they are at the mercy of the priorities and abilities of their collaborator. On the other hand, if they seek to undertake the task alone, they must first educate themselves in social science methodology to a reasonably sophisticated level before embarking upon substantive work. But this process of education is lengthy and problematic. At the end of it, the legal scholar may still not know enough, or the impetus for the research project may have disappeared. And, moreover, the investment of so much time is likely to pay only limited dividends in terms of feedback in courses and seminars. Thus, it will be a rare and determined individual who perseveres and equips himself to undertake serious interdisciplinary research.

Yet this problem of time does not fully explain our limited success in socio-legal research. Why have we failed to do what we know we ought to do in this area?

Perhaps one explanation for our failure is that legal academics are still struggling to legitimate their position within the legal profession. To do this, we must continually demonstrate our proficiency in the conventional arts of lawyering. This exercise consumes not just time but energy, and rewards skills other than those involved in socio-legal research. And we must also be careful not to offend the intellectual taboos which the profession respects. Insights gained through interdisciplinary research may well collide with such well-accepted legal “truths” as the pre-eminent value of adjudication as a method of resolving conflict or of “reasonableness” as a workable test of conduct. Thus to embark upon such research is not only to turn one’s back upon more acceptable tasks, but as well to risk unpleasant confrontation with some basic beliefs and values of the profession.

Much significant legal research has been commissioned by law reform bodies or other public agencies. Their sponsorship has many attractions: it provides funds, time away from other duties, access to

data and expert assistance, respectability, and the incentive of practical application. These bodies have done much for the cause of research in Canada. But commissioned research is not the ultimate answer to this country's deficit of socio-legal scholarship.

Even assuming that commissioned research can be fundamental and comprehensive, rather than merely task-orientated and trivial, that it is ultimately put into the public domain rather than locked up in secret files, the fact remains that it is commissioned. This fact constrains the researcher. He knows he is pursuing someone else's priorities, not his own. He knows that he has been paid for his work, and that he owes his patron a certain degree of loyalty and immunity from criticism. And he knows that the ultimate measure of his work will be its acceptability rather than its scholarly worth.

I would therefore argue that socio-legal researchers should not be utterly dependant on such patronage. In order to preserve the freedom to select their own priorities, to speak with complete independence, to set their own scholarly standards, these researchers need other options. Let me suggest some.

First, because I believe that individual skills and motivation are the *sine qua non* of any successful effort, it is essential that individual faculty members be given leave for purposes of intellectual retooling. Second, funds must be made available from non-governmental sources to support their work. Third, socio-legal research should be given a symbolic focus by the establishment of one or more centres to which researchers could be seconded for periods of time. Hopefully, such centres would maintain a small permanent staff of social science consultants, and sponsor a journal and other publications. But most of all they would provide a forum for intellectual interchange and mutual moral support. And finally, the law schools should establish a demilitarized zone within their curricula for students and faculty members who wish to study and pursue serious research using interdisciplinary insights. This zone cannot be justified "economically" in the sense that faculty teaching loads will approximate those generally prevailing, or that students will be able to barter their credentials for better articling jobs. But it will be an invaluable investment in the exploration of the real problems of law in Canadian society.

In the fullness of time, perhaps, socio-legal work by law students and professors will come to be seen by even relatively conservative lawyers as a legitimate professional activity. They will come to understand that many lawyers work for or against bureaucracies, for

example, and that they will be more effective if they have some knowledge of organization theory. They will come to concede that the quality of the daily, routine advice given by lawyers to businessmen is enhanced if they understand economics and politics as well as law. And some, in these days of a crowded legal profession, will even embrace new career possibilities which are open to those whose knowledge is derived from sources more exotic than the Rules of Practice or the law reports. When this happens the armistice between "real" lawyers and the hybrid socio-legal species will become a treaty of friendship and cooperation. And this pious hope brings me to the conclusion of my paper.

VII. *Conclusion*

Despite the qualms and qualifications I have expressed, I do believe that Canadian legal education has achieved much in the last ten or twenty years. Law teachers have scaled the loftiest heights of power and prestige, broken new ground through research and writing, and launched their students on conventional and unconventional careers equipped to an unprecedented degree with professional skills and social commitment. But still this ultimate, this devilish, paradox: despite its successes, and perhaps because of them, Canadian legal education remains a fragile, almost ephemeral, enterprise.

I want, first of all, to address the components of its success, then to attempt to analyze its weaknesses, and finally to say a word about the future of legal education.

To the extent that success is symbolized by penetration of various professional elites, it is not difficult to understand how and why the law schools succeeded. Law teachers were obvious candidates for many prestigious posts because of their professionalism, not their intellectualism or radicalism. They have made their way more as technocrats than as ideologues. No doubt many, perhaps most, of the law teachers who have moved on to judicial or public service careers represented a liberalizing influence in their new settings, but this says more about the institutions which they joined than about their own philosophical stance.

From this perspective, the greatest risk to continued success is that legal education will be outflanked. On one side, well-trained young lawyers, often from the more sophisticated metropolitan law firms, can now compete with law teachers in sheer technical ability. On the other, the failure of legal scholars to develop new, fundamental theoretical perspectives on "the system", leaves them

vulnerable to intellectual competition from other groups, both inside and outside academe. But, truth to tell, if the job can be done better by people from other backgrounds, so it should be. What is much more troubling than the precarious prestige of law teachers is the potential for serious deterioration within the law schools.

Whatever else may be said of Canadian law schools, over the last quarter-century, they have at least raised the intellectual level of the legal profession. But this praiseworthy achievement may be in danger. In a sense, many of our best and brightest find themselves all dressed up with no place to go. Although necessary for service to clients, much of the practice of law is boring, routine, uninspiring, unworthy of the attention of the cream of the nation's youth. What does the rivetting together of contractual boilerplate offer to a student who is steeped in consumerism? What does the prosecution or defence of minor offenders evoke in a student who was a budding criminologist? Of course, in the early years of a career, it is possible to regard these less glamorous professional chores as an economic necessity, as a learning experience, even as a necessary way-station on the road to higher-level work. But economic rewards do not feed the hungry mind, apprenticeship reaches a point of diminishing returns, and there is not enough higher-level work to occupy all who are ultimately available to do it.

Then the reaction begins. For some time, this reaction prompts an instinctive reaching backward for the excitement of law school — tentative inquiries about graduate work, full-time or part-time teaching. For others, the logic of their discontent leads to a complete change of direction from law to journalism or politics or business. But for most, change seems an unaffordable luxury. Of those who persevere, only a minority will find ultimate professional satisfaction. But many will be brutalized by their experience and will learn to survive only by regarding their unhappy lot as the natural and normal career of a lawyer. Within the framework of their perception, modern legal education must seem somewhat irresponsible. It would be tragic if these disillusioned graduates appeared ultimately as hostile witnesses against the law schools, and blamed them for their disappointments. Yet this is a serious possibility.

And finally, one of the great accomplishments of modern legal education has been to become more "relevant", more intimately concerned with the real problems of people in our society. This we were able to do with relative ease at least partly because we were

participating in a more general development which occurred virtually everywhere in the world of education. Now, as many of the influences which helped to shape modern legal education come under criticism throughout society, we are unlikely to escape unscathed.

The ideas of progressive education have helped to influence our views of how and what to teach. Like the primary and secondary schools, we may soon be pressured to return to "basics", abandon "frills", impose discipline and teach deportment. The welfare state and the regulated economy have been regarded as facts of life which should be mirrored in the content of our courses. As these facts of life draw greater political fire, the law schools may well be hit on the ricochet. The principle of equality of opportunity has been a growing influence in our admissions policies, at least in recent years. We may well feel the sting of any backlash that develops against minorities and disadvantaged groups. Legal research, especially socio-legal research, has often been fueled by the notion that if we only understood a problem, we could do something about it. As so many problems daily seem to become intractable, the motive power of research may dwindle.

In all of these possibilities there is a great deal of irony. If only we had committed half the sins we will be accused of, we would have accomplished so much more than we actually did.

Yet it is not external criticism which ultimately poses the most serious dangers for Canadian legal education. I expect that where there seems to be merit in such criticism, we will defer to it. Where it is misinformed or merely malicious, we will probably have the sense to disregard it. Indeed, external criticism may strengthen the law schools. It is not unknown for institutions to rise to their finest hour in responding to external threats.

The greatest danger, the only real danger, to Canadian legal education is not that it will be attacked too severely by its enemies, but that it will be too little loved by its friends.

I have several times mentioned the astonishing emergence of law teachers in prestigious positions throughout the legal and political system as evidence of our success. But consider what the departure of each such person from law teaching means to the enterprise. At the most obvious level, it means that the most outstanding men and women are no longer available to teach classes, to write books, or to help to chart the future course of educational developments. The loss is qualitative, not merely quantitative, and thus particularly

painful. Perhaps less obvious is the message for the colleagues they leave behind in the law schools. In effect, their departure implies that legal education offers them less intellectual scope, less personal challenge, less opportunity for social contribution than the new political, judicial, administrative or practice roles they have accepted in preference to law teaching. This implicit, sometimes explicit, message does little to enhance morale. Moreover, their departures legitimate a career pattern which will tend to attract into law teaching birds of passage whose ultimate destination is elsewhere. And, finally, a constant turnover of faculty members disrupts the intellectual and social networks which can do so much to provide stimulation and sustenance within a faculty.

For all of these reasons, I see the dwindling passion of the professoriate as the greatest menace faced by Canadian law schools.

I am neither unaware of, nor consoled by, the many good reasons why law teachers may prefer to be elsewhere. I understand full well the challenge and the civic obligation of judicial service; I accept that many have the legitimate desire to test their mettle in the cut-and-thrust of practice or politics; I concede that teaching can become repetitive and that if the muse temporarily withholds her favours, a lifetime of scholarship must present the ultimate torment; above all, I understand the impulse towards personal change in a changing society and in the critical mid-career period. And I have not mentioned fame or money; I do not think that these are important considerations.

I know, and respect, the validity of all of these (and other) considerations which have led so many outstanding law teachers to move on to other careers. Whether they could have been happy in the long run, I would not presume to predict. But I believe honestly that the country would have been better off if many of them had stayed in law teaching. What, apart from the need to reassure myself, leads me to suggest that legal education is a more deserving beneficiary of their talents than other private or public careers?

My concern is with marginal utility; the potential impact of one more good law professor is much greater in the long run than that of one more good judge, lawyer or politician. Legal education is the fulcrum of the Canadian legal system. Law schools must train lawyers to new and higher standards of technical competence and professional responsibility; they must be a source of intellectual innovation for the profession; and they must provide the public with a disinterested and informed evaluation of the legal system. None of

these important public functions will be performed well if law schools should become a mere staging ground for the bench, bar or cabinet. We cannot have both perpetual motion and serious pretensions to excellence.

In the face of current realities — cutbacks, criticism, and constant turnover — it is hard to be optimistic. But if only to sustain the theme of paradox on which this paper began, I do want to conclude on an optimistic note.

Canadian legal education did not make its great leap forward in the 1960s because there was more money available, because the profession removed its heavy hand, because it experienced an influx of new students and teachers — though all of these helped, to be sure. What moved our law schools ahead was ultimately the decision of faculty and students and administrators to seize the challenge and the opportunity — to improve the profession, the legal system, the quality of justice, and their own performance.

Current realities have not altered that challenge, although they may have diminished opportunities to some degree. We now understand that we cannot do everything, or at least cannot do everything all at once. But if our task is going to be harder, it is still immensely worthwhile. And what better basis for optimism is there, after all, than the existence of a challenge and of good people to meet it?